STRAITS SETTLEMENTS LAW REPORTS.

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[APPELLATE CRIMINAL JURISDICTION]

GERAHTY, J.

June 19, 1934.

MOHAMED KAUS BIN HAJI AMAN..... Appellant.

vs.

REX.....Respondent.

[MALACCA MAGISTRATE'S APPEAL No. 2 of 1934]

Criminal procedure—Security for keeping the peace and for good behaviour—omission to make an order before Inquiry held—whether an irregularity vitiating proceedings—Criminal Procedure Code, Ss. 76, 82, 428.

In cases where security for keeping the peace and for good behaviour is required to be furnished, omission to make an order under Section 76 of the Criminal Procedure Code setting forth the substance of the information received by a Magistrate, the amount of the bond to be executed, etc., is an irregularity which cannot be cured under section 428 of the Code.

A. Kylasam v. *Public Prosecutor*, 1 F.M.S.L.R. 276 considered and distinguished.

APPEAL from an order made by the Police Magistrate of Malacca under Section 82 of the Criminal Procedure Code requiring the appellant to execute a bond to keep the peace for 6 months with two sureties in $250 each.

Goho for appellant.

N. A. Worley, Deputy Public Prosecutor, for Respondent.

Cur. Ad. Vult.

GERAHTY, J.—This is an appeal against an order made under Section 82 of the Criminal Procedure Code whereby the appellant was required to execute a bond to keep the peace for 6 months with two sureties in the sum of $250 each, on the ground that the Magistrate was wrong in law in making the order appealed against without first making an order in writing under Section 76 Criminal Procedure Code.

In his grounds of judgment the Magistrate admits that Section 76 Criminal Procedure Code was not complied with and it is contended that in the particular circumstances of this case the appellant was in no way misled by that omission. From a perusal of the record and of the summons which was served upon the appellant in the first instance I am satisfied that this contention is substantially correct.

The only point for decision is whether the omission to make an order under Section 76 Criminal Procedure Code is an illegality and as such vitiates the proceedings rendering the order appealed against a nullity, or whether the omission is a mere irregularity falling within the purview of Section 428 of the Code.

The Deputy Public Prosecutor cited the case of *A. Kylasam* v. *P. P.*, 1 F.M.S.L.R. 276, and contends that on the authority of that case the omission to make an order under Section 76 is an irregularity and does not vitiate the trial unless a failure of justice has been occasioned.

On reading the judgment of Innes, J.C., as reported at p. 277 it would appear that in this case there was in fact an order but that "the order merely informed the appellant that he was called upon to show cause.....why he should not be bound over to keep the peace." The learned judge decided that the disregard of the relevant section of the F.M.S. Criminal Procedure Code was an irregularity which did not occasion a failure of justice and was one which having regard to the provisions of Section 335 (now section 419) of the F.M.S. Criminal Procedure Code (Section 428 of the S.S. Code) does not call for the quashing of the Magistrate's order by the Court.

According to a note on p. 53 of Mr. Mallal's Commentary on the Criminal Procedure Code of the Straits Settlements it appears that in another appeal heard shortly after the above appeal Earnshaw, J., declined to follow the above decision and held similar irregularities to be fatal.

In my view the case before Innes, J.C., is clearly distinguishable from the present case. In that case there was an order, but an imperfect order, in that it did not fully comply with the provisions of Section 68 of the F.M.S. Criminal Procedure Code, 1903, (Section 76 of this Code). In the present case Section 76 has been entirely disregarded and no order was made or served upon the appellant in accordance with the provisions of Section 79 of the Code.

The wording of Section 76 appears to me to be mandatory. The Court "shall make an order in writing" setting forth certain prescribed particulars. The purport of the section is to provide a definite mode of procedure preparatory to an enquiry under Section 81.

I am strongly of opinion that the provisions of Section 428 of the Code, wide as they appear to be at first sight, should not be construed so as to override express and mandatory provisions of the Code.

This principle was enunciated in the judgment of the Lord Chancellor in the case of *Subrahmania Ayyar* v. *King Emperor*, on an appeal to the Privy Council from the High Court of Judicature of Madras reported in 25 Madras p. 61.

The following passages occur in the judgment:

> "Their Lordships are unable to regard the disobedience to an express provision as to a mode of trial as a mere irregularity." "The remedying of mere irregularities is familiar in most systems of jurisprudence but it would be an extraordinary extension of such a branch of administering the criminal law to say that, when the code positively enacts that such a trial as that which has taken place here shall not be permitted, this contravention of the Code comes within the description of error, omission, or irregularity."

While the facts in that case differ entirely in their nature from those in the present case, the same principle is, in my view, common to both, inasmuch as a particular mode of trial is provided in regard to enquiries held under Chapter VII of the Code and an order under Section 76 is expressly directed as a foundation for such an enquiry.

I am, therefore, of opinion that the omission to make an order under Section 76 in this case is an illegality and not a mere irregularity and as such vitiates the proceedings.

The appeal is allowed and the order of the Magistrate set aside.

Appeal allowed.

Solicitors for the appellant—*Rogers & Son.*

[ORIGINAL CIVIL JURISDICTION]

PRICHARD, J.

July 5, 1934.

RE SIEW INN STEAMSHIP COMPANY. *EX PARTE* HO HONG BANK, LIMITED

(In Voluntary Liquidation)

In The Issue

TAN BOON CHEO.....Plaintiff.

v.

HO HONG BANK, LIMITED (In Voluntary Liquidation).....Defendant.

[SINGAPORE BANKRUPTCY No. 896 of 1932]

Partnership — Retirement of partner — Advertisement—Notice of dissolution in newspapers whether sufficient.

An advertisement in three local Chinese newspapers of the dissolution of a partnership is not *per se* sufficient notice to those having had dealings with the firm who have not actually seen it although they may be regular subscribers to the newspapers; but to fix them with knowledge of the fact so as to prevent them holding a retiring partner liable for debts incurred after retirement, express notice must be given.

Trial of an Issue before Prichard, J.

On the 3rd of February, 1933, a Receiving Order was made in these proceedings against the Siew Inn Steamship Co. and an Adjudication Order passed against the plaintiff in the Issue (Tan Boon Cheo) as a partner of the bankrupt firm.

On the 13th of May, 1933, the plaintiff applied to the Court for annulment of the Adjudication Order on the grounds *inter alia* that at the date of making the said Order he was not a partner of the firm and that he was not indebted to the petitioning creditors.

By Order of Court dated the 16th June, 1933, the application for annulment of the Order of Adjudication was adjourned and entered in the general cause list for further consideration and by a further Order of Court dated the 26th of September, 1933, the Court directed the following issue to be tried, namely:—

> Whether the said Tan Boon Cheo was or held himself out to the Ho Hong Bank, Limited, the petitioning creditors to be a partner in the Siew Inn Steamship Company and, if so, at what date if any the said Tan Boon Cheo give or cause to be given notice to the petitioning creditors that he had ceased to be a partner of the bankrupt firm.

In pursuance of the last-mentioned Order of Court pleadings were filed. The case for the plaintiff in the Issue was that prior to the 31st of December, 1931, he together with one Tan Siew Inn carried on the business of owning and operating steamships, under the firm name or style of "Siew Inn Steamship Co." On the 31st of December, 1931, the plaintiff in the Issue retired from the partnership and notice of the dissolution of partnership and retirement of the plaintiff from the firm was duly given by the plaintiff and Tan Siew Inn to the defendant Company in the Issue through an advertisement published in the three local Chinese newspapers, "Sin Chew Jit Pau," the "Nanyang Siang Pau" and the "Min Kuo Jih Pau" between the 12th and 16th of January, 1932, and by verbal communication from the plaintiff to the defendant company in or about the month of March, 1932. The Statement of Claim further stated that the defendant company commenced an action against the Siew Inn Steamship Company and recovered therein judgment and costs, the plaintiff not having been served with the Writ in the action. The plaintiff contended that the defendant company in obtaining with full knowledge of the dissolution of partnership above referred to, an Adjudication Order against him had acted wrongfully. The plaintiff claimed annulment of the Adjudication Order. By their defence the defendant company pleaded *inter alia* that they had no notice of the dissolution of the partnership of Siew Inn & Co. and contended that